No. 89-1253

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1989

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BLOUNT COUNTY BOARD OF EDUCATION, *et al.*,
*Petitioners,*

v.

MARY E. NICHOLS,
*Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Of the questions sought to be presented by petitioners, the only one that was raised below, and hence the only one that can be raised in this Court, is whether the evidence was sufficient to support the jury's finding of intentional discrimination.

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

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Respondent Mary E. Nichols submits this brief in opposition to the Petition for Writ of Certiorari.

### OPINIONS BELOW

The opinions and orders of the District Court, the *per curiam* opinion of the Court of Appeals, and the order denying rehearing are all unreported, and are reproduced in the Appendix to the Petition.

### STATUTES INVOLVED

This is an action under 42 U.S.C. § 1983 to redress sex discrimination in public employment. Contrary to the assertion in the Petition at 2, this case does not involve 42 U.S.C. § 1981 in any way.

## STATEMENT AND SUMMARY

The Petition seeks essentially to raise three questions: (1) whether, under *Will v. Michigan Department of State Police*, 491 U.S. ——, 109 S. Ct. 2304 (1989), Blount County Board of Education and its Superintendent and Principal in their official capacities are "persons" suable under § 1983;[1] (2) whether, under *Jett v. Dallas Independent School District*, 491 U.S. ——, 109 S. Ct. 2702 (1989), and *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Superintendent and Principal are "policymakers" whose acts may be attributed to the Blount County School District;[2] and (3) whether the evidence was sufficient to support the jury's finding of intentional discrimination.[3]

Petitioners seek to create the impression that the foregoing three issues were raised in the District Court, that the District Court "begged for clarification" of the law with regard to each of them, that this Court provided such clarification in a series of decisions rendered last term, and that the Court of Appeals "mistreated" petitioners by inexplicably "ignor[ing] not only a District Court's plea for clarification, but the very clarification available from the recent decisions of [this] Court." Petition at 3, 8, 12-13. As we will show, petitioners' characterization profoundly distorts the posture of this case.

Neither the *Will* issue nor the *Jett/Praprotnik* issue was raised by petitioners in the District Court, or even in their briefs to the Court of Appeals. Those issues were raised for the first time in a petition for rehearing, and are therefore not properly before this Court. See *infra* at 3-8.

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[1] *See* Petition at i (second question presented), 3-4, 8-9 13-14.

[2] *See* Petition at i, ii (third and fifth questions presented), 3-4, 5, 9, 14-15, 16-17.

[3] *See* Petition at i (fourth question presented), 4-5, 9, 15-16.

The remaining question sought to be presented by petitioners—*viz.*, whether the evidence was sufficient to support the jury's finding of intentional discrimination—was raised below, but does not warrant this Court's review. Contrary to petitioners' suggestion, the District Court did not "beg for clarification" of the law in this regard; and nothing in this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. ——, 109 S. Ct. 1775 (1989), would affect the resolution of this case. Indeed, petitioners do not really contend otherwise; they merely challenge the jury's assessment of the evidence. That challenge, having been rejected by both courts below, presents no question warranting review. *See infra* at 8-9.

## REASONS FOR DENYING THE WRIT

### I. NEITHER THE *WILL* ISSUE NOR THE *JETT/PRAPROTNIK* ISSUE IS PROPERLY BEFORE THIS COURT

A. Because petitioners did not raise on appeal either the "*Will* issue" (whether the Blount County Board of Education and its officers are "persons" suable under § 1983) nor the "*Jett/Praprotnik* issue" (whether the Superintendent and Principal are "policymakers"), neither issue was addressed by the Court of Appeals. *See* Pet. App. A-8.

In their briefs to the Court of Appeals petitioners raised three issues. *See* Brief of Appellants at 1, *Blount County Board of Education, et al. v. Nichols*, No. 88-7606 (5th Cir. 1989). Two of these dealt with the District Court's assessment of the sufficiency of the evidence of discrimination, *see id.* at 1, 34-53; the third challenged the jury instructions solely with respect to the question of the burden of proof in a case of intentional discrimination.[4] Neither petitioners' opening brief nor their reply

[4] *Id.* at 1, 53. Specifically, petitioners complained that "the judge, over defendants' objection, instructed the jury that the plaintiff did

brief contained a single word with respect to the *Will* and *Jett/Praprotnik* issues.

Nor are those issues addressed in the opinion of the District Court, *see* Pet. App. A-1–A-6, and for good reason. In their motions for summary judgment,[5] directed verdict,[6] and judgment notwithstanding the verdict,[7] petitioners did not raise either the *Will* or *Jett/Praprotnik* issue, but contended only that no discrimination had been proved. In petitioners' objections to the District Court's jury instructions, petitioners likewise failed to raise these issues.[8]

In these circumstances, the *Will* and *Jett/Praprotnik* issues are not properly before this Court. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("that question was not raised in the Court of Appeals and is not properly before us"); *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (the rule against deciding questions "not raised or litigated in the lower courts" has "special force where the party seeking to argue the issue has failed to object to a jury instruction"). *Cf. Praprotnik*, 485 U.S. at 119-20 (Court addressed an issue despite petitioner's failure to object to a jury instruction, but only because the petitioner had raised the issue in a motion for summary judgment, a motion for directed ver-

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not have to prove that sex was the *only* factor considered by defendants; rather plaintiff had to prove that sex was *one* of the factors which was a determining factor leading to the defendants' employment decision." *Id.* at 53 (emphasis in original).

[5] District Court docket entry 30 (May 6, 1988).

[6] District Court docket entry 36 (Aug. 9, 1988).

[7] District Court docket entries 40, 41 (Aug. 18, 19, 1988).

[8] *See* Trial Transcript, R. 156-170. Indeed, petitioners did not even raise these issues in their answer. Other than denying that any discrimination occurred, the only defense asserted by petitioners was one of "sovereign immunity" based on "good faith." Answer at 2, District Court docket entry 5 (Oct. 9, 1987).

dict, and a motion for JNOV, and the issue had been "very clearly considered, and decided, by the Court of Appeals").[9]

Although an "intervening, substantial change in law" occurring after the conclusion of proceedings in the lower courts may on occasion amount to an "extraordinary circumstance" justifying this Court's consideration of an issue not raised below, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896 n.7 (1984), that is not the situation here. As this Court noted in *Will*, the Court's decision in that case was consistent with the weight of authority in the lower courts, including a 1982 decision of the Fifth Circuit. *See Will*, 109 S. Ct. at 2306-07 n.3 (citing 17 lower court decisions). As for *Jett*, while that case made new law by extending the "policymaker" requirement to § *1981*, it did not break any new ground insofar as § *1983* is concerned; and this case involves only the latter statute. In this regard the *Jett* Court simply applied the principles "enunciated by the plurality opinion in *Praprotnik*," *see Jett*, 109 S. Ct. at 2724; and *Praprotnik* had been decided before this action was filed, let alone tried. In short, there is nothing in this case to warrant a departure from the general rule that issues not properly raised below should not be entertained by this Court.

B. Although petitioners' failure to raise the *Will* and *Jett/Praprotnik* issues below is dispositive of their request for review of those issues, in the interests of completeness we now show that, in the circumstances of this case, these issues do not in any event warrant review by this Court.

To begin with, the *Jett/Praprotnik* issue in and of itself has no practical significance *vis-a-vis* the judgment

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[9] Petitioners did raise the *Will* and *Jett/Praprotnik* issues for the first time in their petition for rehearing in the Court of Appeals, but that belated effort, which was summarily rejected by the Court of Appeals without opinion, is insufficient to preserve the issue for purposes of certiorari. *See Hoover v. Ronwin*, 466 U.S. 558, 576 n.25 (1984). *Cf. Praprotnik, supra.*

below. Through special interrogatories, the jury was asked to determine separately as to the Superintendent of Schools, the Principal, and the *Blount County Board of Education* whether "sex was a determining factor in the decision of [*that defendant*]" with respect to the promotion at issue. In each case, the jury's answer was "yes". *See* Trial Transcript, R-219. The issue petitioners now seek to raise concerns only "whether the *principal and superintendent* were policy-makers or possessed policy-making authority in the area of employment hiring," Petition at ii (emphasis added), and does not in any way implicate the undeniable policy-making authority of the *Board itself*. Accordingly, even if petitioners were to prevail on the *Jett-Praprotnik* issue they seek to raise, the finding against the Board, and in turn the liability of the Blount County School District, would be unaffected.

The liability of the School District could be impacted only if petitioners could show that the District is not a "person" for purposes of § 1983. But such a showing simply cannot be made, and petitioners' reliance on *Will* in this regard is totally misplaced.

*Will* reaffirmed the holding in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) that local government agencies are "persons" under § 1983. The Court emphasized that the holding in *Will* that a *State* is not a person applies "only to States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." 109 S. Ct. at 2311, citing *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). *Mt. Healthy* makes it clear that a school district is generally not to be considered an arm of the State for Eleventh Amendment purposes. *See* 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3524 (1984) at p. 133 ("[l]ocal school districts, for example, usually are classified as political subdivisions not covered by the [eleventh] amendment"). *See also Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974) ("a county does not occupy the same position as

a State for purposes of the Eleventh Amendment"). Consistent with this general rule, the Alabama federal decisions have uniformly held that Alabama school districts are not arms of the State for Eleventh Amendment purposes. *See Rolin v. Escambia County Board of Education*, Civ. Action No. 88-0314-AH (S.D. Ala. 1989) (collecting cases); *Smith v. Dallas County Board of Education*, 480 F. Supp. 1324, 1335-36 (S.D. Ala. 1979). Thus, the holding in *Will* does not apply to the Blount County School District.[10]

What is more, even if the law were otherwise and petitioners were able to prevail on both the *Jett/Praprotnik* and *Will* issues, that would not vitiate the judgment below. Respondent would still be entitled to recover against the Superintendent and the Principal in their individual capacities, as the judgment (quoted in the Petition at 4) provides.

It is only in the interests of completeness that we have undertaken to demonstrate that the *Will* and *Jett/Praprotnik* issues would have no impact on the decision of the Court of Appeals even if those issues were properly before this Court for review. The threshold—and dispositive—response to petitioners' request for review of these issues is that they were not raised below, and

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[10] The cases cited in the Petition at 14 are not to the contrary. *Hutt v. Etowah County Board of Education*, 454 So.2d 973 (Ala. 1984), dealt only with immunity from state tort suits. *Jaffree v. Wallace*, 705 F.2d 1526, 1533 (11th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984), *aff'd on other issues*, 472 U.S. 38 (1985), held only that the action of a county or of a county school board is generally "state action" for purposes of the Fourteenth Amendment. That holding is of no relevance here. As this Court noted in *Edelman v. Jordan*, "[w]hile county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment." 415 U.S. at 667 n.12. *See also Fay v. South Colonie Central School District*, 802 F.2d 21, 27 (2d Cir. 1986) "([s]tate action for purposes of the Fourteenth Amendment is not equal to *being* the state for purposes of the Eleventh Amendment") (citing *Edelman*) (emphasis in original).

there are no special circumstances warranting an exception to the general rule that this Court will not entertain questions not properly presented to the courts below.

## II. THE QUESTION OF THE SUFFICIENCY OF THE EVIDENCE DOES NOT WARRANT REVIEW BY THIS COURT

As the Court of Appeals stated, "[t]his was a close case, hotly disputed." Pet. App. A-8. Petitioners advanced ostensible nondiscriminatory reasons for the challenged employment action, but respondent vigorously maintained that petitioners' explanation was pretextual and that sex discrimination was at work.[11] In these circumstances, it is perhaps understandable that the District Court struggled with the question whether the evidence was sufficient to support the verdict. In grappling with that question the District Court did not, as petitioners assert, "beg for clarification" of the law. The court simply observed that uncertainty as to whether discrimination has been adequately proved is "endemic to the breed" of employment discrimination cases. Pet. App. A-2. This Court has made a similar observation in stating that "[a]ll courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult." *United States Postal Service Board v. Aikens*, 460 U.S. 711, 716 (1983).

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[11] In her Second Amendment to the Complaint, respondent alleged that "[t]he reasons articulated by the defendants for failing to award to plaintiff the vacant position as assistant principal at Locust Fork School were pretextual; the denial to plaintiff of these positions was unlawful sex or gender discrimination." District Court docket 13 (Dec. 3, 1987). The extensive evidence supporting that claim was discussed at length in respondent's brief on appeal. Brief of Appellee at 3-15, 19-30, *Blount County Board of Education v. Nichols*, *supra*. Petitioners' assertion that respondent "admitted that the reasons given by the Defendants were true, legitimate and nondiscriminatory," Petition at 12, and that petitioner asked the jury to substitute its judgment for that of the school officials, *id.*, is completely unfounded. And, as we have noted, the jury specifically found that "sex was a determining factor" in petitioners' actions.

To its credit, despite a "degree of uncertainty," Pet. App. A-6, n.9, the District Court recognized that there was sufficient evidence to suport the jury's verdict, and it therefore refused to set the verdict aside. The Court of Appeals independently "carefully reviewed the record and . . . conclud[ed] that there was sufficient evidence." Pet. App. A-8. Although petitioners disagree with those conclusions, they offer no persuasive reason why this Court should undertake a third review of the sufficiency of the evidence.[12]

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[12] In arguing that respondent failed to adduce adequate proof of pretext, petitioners point to this Court's decision last Term in *Price Waterhouse v. Hopkins*, 490 U.S. ——, 109 S. Ct. 1775 (1989). But *Price Waterhouse* did not change the law applicable to this case, and petitioners do not actually contend that it did. Indeed, the very passage petitioners quote from *Price Waterhouse* shows that for cases such as this, *Price Waterhouse* simply reaffirmed the burden-of-proof rules set forth in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *See* Petition at 16.